

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

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| Bakery, Confectionary, Tobacco Workers, |) | |
| and Grain Millers International Union, |) | |
| AFL-CIO-CLC, Local Union No. 1, |) | |
| |) | |
| Petitioner, |) | |
| |) | |
| and |) | Case No. 13-RC-113248 |
| |) | |
| Lifeway Foods, Inc., |) | |
| |) | |
| Respondent. |) | |

Answer of Petitioner to Exceptions and Brief in Support of Respondent Employer

An election was held on June 19, 2014 to permit those employees of Respondent (“Employer”) who are employed in the bargaining unit to vote for or against representation by Petitioner (“Union”). There were three voting locations and four voting times. Approximately 96% of the employees claimed to be eligible voters participated in the election. At the conclusion of the polling there were challenges which, at that time, could have been determinative of the outcome of the election. Of the challenges to voters the Union challenged 42 voters for cause and the Board challenged 6 voters who were not on the Excelsior list. The Employer did not challenge any voters but did challenge the interpretation of one ballot. Jt. Ex. 1, Emp. Ex. 13. Both the Union and the Employer filed their position on the challenges as well as objections to the election. At the start of the hearing the Employer agreed that of the 48 challenges, 25 were not eligible voters in the unit and the Employer withdrew its challenge to the interpretation of the ballot. Accordingly, the remaining challenges, 23 in total, were not

determinative of the outcome of the election and the parties agreed that a hearing on the challenges was not necessary. Jt. Ex. 1. The Union received a majority of the votes counted and therefore withdrew its objections to the election. A hearing was held on the objections of the Employer.

The hearing was held over four days. The assigned Hearing Officer (“HO”) was from a Region other than Region 13 and Region 13 had a representative present during the hearing. Numerous witnesses testified resulting a transcript of approximately 900 pages as well as multiple exhibits. The HO permitted the parties to file briefs within the 7 day period proscribed by the Rules. No party requested an extension to file its brief. On October 30, the HO issued a Report and Recommendations on the Challenged Ballots and Objections (“HOR”). The HOR acknowledge the acceptance of the stipulation of the parties as to the challenged ballots, recommended approval of the withdrawal of the Objections of Petitioner, recommended that the Objections of the Employer be overruled, and recommended issuance of the certification. (HOR 6, 30). Respondent filed Exceptions to the HOR as well as a Supporting Brief. The Exceptions a without merit and the Board should adopt the HOR and reject the Exceptions.

An election will not be overturned unless there is misconduct which has effected or has a reasonable tendency to effect the outcome of the election. *Delta Brands Inc.*, 344 NLRB 252 (2005). There are a number of factors which the Board looks to determine whether the misconduct effects the outcome of the election including the number of incidents, severity, knowledge in the unit, and whether the conduct is attributable to a party. *Taylor Wharton Division*, 336 NLRB 157 (2001). Although the Employer excepts to this legal principle as discussed in the HOR, the burden is on the party filing the objections to prove misconduct and

that the misconduct effected the outcome of the election. *Affiliated Computing Services*, 355 NLRB No. 163 (2010).

The Employer in its brief in support presents a “Statement of Facts” which essentially sets out the facts the Employer would like to have proven through the hearing but which were not. Thus, for example, the Employer asserts on page 13 that at 9:30 am the Board agent escorted eligible voters from the polling area in the presence of other voters in line. Although there were some witnesses that testified as the Employer summarizes, upon further examination the testimony of its own two witnesses on the issue cannot be reconciled. Although George de la Fuente testified that five employees, of whom he named four came and all of those were stipulated not to be eligible voters (Tr. 154-157; HOR pg 6), came into the office to complain that they had not been allowed to vote and then voted later. The Company observer testified that the employees who were allegedly taken out of the room all left together and returned very soon and then further quantified the time to within a minute; and then said the Board agent did not go out with them but just went to the door and then let them right back in. (Tr. 512-514, 522-526). The Union observer, Jesus Adan, testified that when the first group of voters came in they were allowed to vote although if challenged the vote would be placed in a yellow envelope. He later testified that no group of employees was asked to leave the voting area. (Tr. 736-738, 748). The Employer then goes on to question the testimony of Ortiz by implying that at least two of the employees came back later to vote based on testimony of witnesses who stated they voted later in the day. (Employer brief at 16). Finally, as noted above, the Employer stipulated that these employees in fact were not eligible to vote.

The above paragraph highlights that the Board should ignore the “Statement of Facts” in

the brief. The HO was charged with the fact finding process and his factual findings, particularly those based on credibility, are not disturbed by the Board unless a clear preponderance of all the relevant evidence convinces the Board that the findings are incorrect. *Magnum Transportation*, 360 NLRB No. 129 note 2 (May 30, 2014) citing *Stretch-Tex Co.*, 118 NLRB 1359, 1361 (1957). This Answer will focus on the issues raised in the Argument portion of the brief.

The Exceptions and the Brief in Support essentially raise two major complaints regarding the HOR. Initially, the Employer complains about the manner in which the HO conducted the hearing including the competency of the translator, off-the-record discussions, assistance or coaching the undersigned Petitioner's counsel, restriction on briefs, asking witnesses what the Employer characterizes as "misleading questions", and overruled the objections of Employer counsel among other similar and duplicative complaints. Secondly, the Employer excepts to the findings of the HOR in four broad categories: 1) that the instructions of Petitioner as to challenges such as no women are eligible at Morton Grove and to challenge drivers was not objectionable conduct and did not chill the rights of any employees; 2) that the Board agents at Morton Grove did not engage in misconduct or otherwise objectionable conduct which would chill or disenfranchise any voters; 3) that the Board agent at Niles did not assist the Union observer in making challenges and the same would not have been objectionable in any event; and 4) the purported loss of one ballot was not proven. This Answer will respond to the substantive arguments regarding the HOR, the Employer's later arguments in its brief, first.

1. Petitioner did not engage in objectionable conduct regarding challenges.

In the main the arguments of the Employer are that the HOR incorrectly recommends

that the conduct of the Union in establishing its challenges is not objectionable because the Union challenged mechanics, drivers, and certain “shipping” employees who the Employer claims were part of the stipulated unit and that the Union made challenges based on names, sex, or employee location rather than cause. The HOR properly found that the evidence adduced at the hearing did not show any challenges were made with malicious intent or animus and that the challenges made were based on the Union’s reasonable belief that the employees being challenged were not in the unit. (HOR pgs. 10-13).

The Employer argues that the HOR should be rejected because by challenging voters, allegedly without cause, the rights of those voters are automatically chilled although the Employer offers no support for such a claim. In fact, the Board has long held, as discussed by the HOR, that the challenge of voters is not objectionable conduct. *Iowa Packing Company*, 48 NLRB 305 (1943). See also, *GEO Corrections Holdings*, 12-RC-097792, 2013 WL 6252458, note 2 (December 3, 2013), where the Board affirmed the hearing officer’s finding that the conduct of the Union’s observer in challenging voters was not objectionable but in accordance with the Board’s established procedures and did not tend to interfere with employee choice.

The same is true here. Challenging a voter or voters is not misconduct but a normal and accepted Board process. A party’s observer is entitled to challenge any voter for cause. NLRB Casehandling Manual, ¶ 11338. “When resolving determinative challenged ballots in cases involving stipulated bargaining units, the Board will rely on the scope of the stipulation itself, with its various inclusions and exclusions, unless it is contrary to any express statutory provisions or established Board policies.” *Wells Fargo Alarm Servs.*, 289 NLRB 562 (1988). Use of the challenge procedure is not objectionable conduct and does not effect the free choice of voters so

as to effect the outcome of an election. *Northeast Iowa Telephone Company*, 341 NLRB 670 (2004). In that case the Board rejected an argument that allowing supervisors to vote challenged, about 20% of the unit, was sufficient to require the election be overturned citing the effectiveness of the challenge process. In accord is *Beverly California Corp*, 319 NLRB 552 (1995) finding that exclusion of one classification was not sufficient to overturn an election and *Toledo Hospital*, 315 NLRB 594 (1994), finding that enlarging the unit does not warrant a new election.

Here, the parties' stipulated election agreement did not mention the titles of "driver" and specifically excludes office clerical employees. Thus, as the HOR found the Union's challenge to voters holding the title of driver as well as those employees who the Employer claims are "shipping employees" but who work in an office area and do not interact with any regularity with the majority of the unit was based on its interpretation of the stipulated unit as well as the information available to it regarding the duties of these employees. The fact that the information of the Union that at the Morton Grove facility no women had unit duties is not objectionable. That was the information the Union had as is born out by the testimony of Beth Zavala and the information she received from the unit employees. (Emp. Ex. 22. Tr. 801-803). As discussed in the HOR, challenges based on unit inclusion are not objectionable. *Park 'N Go of Minnesota LP*, 344 No. 152, *4 (ALJ Locke July, 29, 2005) (adopted by the Board). Thus, since the unit specifically excluded office clericals and the individuals challenged, such as Edith Barazza, clearly work in the office the Union had cause to raise the challenge.

Further, the Employer does not acknowledge that the alleged objectionable conduct must not only be objectionable but there must be evidence that the conduct effected the outcome of the

election. No such evidence was adduced. Despite Employer rhetoric there is absolutely no evidence in the record that shows that any driver, shipping employee, woman, or any other employee for that matter did not vote because of any union challenge. In fact, the evidence was that when the first challenges occurred the employees were vocal and arguing with the Board, not that they did not vote. The exceptions of the Employer on this issue should be rejected.

2. No Conduct by the Board Agents at Morton Grove was Objectionable

To set aside an election on the basis of Board agent conduct, the Board must be presented with facts raising a “reasonable doubt as to the fairness and validity of the election.” *Polymers, Inc.*, 174 NLRB 282 (1969), *enfd.* 414 F.2d 999 (2d Cir. 1969), *cert. den.* 396 U.S. 1010 (1970). If there is no misconduct shown there is no reason to reach the question as to reasonable doubt. *Kirkstall Road Enterprises*, 2012 WL 3548194 (2012). In that case the Board specifically determined that the judge need not have gone into the testimony of individual employees given that the Employer did not demonstrate any Board agent misconduct when several mail ballots were missing. Since there was no misconduct shown the inquiry ended and the objection was dismissed. The HOR properly determined that no misconduct occurred and, even if procedures were not strictly followed the deviation did not raise any issue nor was there any evidence that the same compromised the integrity of the election process.

The first issue raised by the Employer is that the Union observer had a list of challenged voters which was marked off as challenges were made. As the HOR finds, parties to an election are entitled to a list of challenges and there is no basis for finding that having such a list is objectionable. *Regency Grand Nursing*, 354 NLRB 530 (2009), ALJ decision at 542, citing *Mead Southern Wood Products*, 337 NLRB 497 (2002). A list of challenges does not constitute

a list of Employee's who voted any more than checking off the Excelsior list provided by the Board.

Next, the Employer raises the issue of large groups being allowed in to vote, although the same is not a specific objection. As noted above, the evidence presented does not support any finding that the Board agent told employees they could not vote and sent them away as found by the HOR. At most the Board agent advised employees that their ballot was being challenged, some employees began questioning the agent, and she moved them aside. According to the only witness, the Company observer, the employees left the room but then came back within a minute. It is unclear from the testimony whether the employees had already voted challenged at this point or if it occurred after the first vote. Regardless there is no evidence that they did not vote, in fact they did vote challenged. Board procedure provides that there should not be any argument on challenges. Section 11338.6. Further, to the extent the employee voted or voluntarily did not vote there is no misconduct. To make such conduct objectionable there must be facts showing that potential voters were actually disenfranchised by the Board agent's conduct. See *Jim Kraut Chevrolet*, 240 NLRB 460 (1979). The same holds true for the allegation that large groups of voters were allowed in the room. The record is devoid of any evidence that the same disrupted much less tainted the election.

Next, the Employer raises a litany of alleged misconduct at Morton Grove running the gamut from a non-Board agent distributing two ballots, a Board agent assisting with challenges or making challenges herself (the Employer states there is uncontroverted testimony on this apparently discounting the testimony of the Union observer who stated that he made the challenges in Spanish which were then translated and the Board agent would ask why the

challenge which was also translated (Tr. 736-742)), that the Board agents did not identify themselves or wear identification, that the Board agent lost custody of ballot boxes, that a Board agent took a ballot and put it in a challenge envelope, and that Board agents did not explain the challenge procedure. The HOR rejected any finding that any of the above actions, assuming it did occur, effected the outcome or integrity of the process. This finding should be adopted by the Board.

Initially, it must be stated that many of the above alleged irregularities were not part of any actual objection filed by the Employer but came up through various witnesses testimony as to their recollection. No one could recall if the Board agents had badges, the number of Board agents either employed by or interpreting for the Board was significant since there were three interpreters necessary thus making identification by witnesses somewhat difficult, and the ballot box issue was mentioned by a witness for Petitioner in just recounting the events of the day however there was no suggestion that the box was not in the possession of a Board agent. As the HOR states and the Board has held the inquiry is not whether procedures may have been deviated from but whether the deviation raises reasonable doubt as to the fairness and validity of the election. Thus, in *Kirsch Drapery Hardware*, 299 NLRB 363 (1990) the Board determined that although the procedure as to handling a ballot were not followed there was no evidence that the said failure significantly impaired the election given that there was no evidence of ballot tampering or that anyone saw how the employee voted. There is no reason to vary from that reasoning here. The purpose of the rules is to insure the integrity of the vote. The fact that one employee may be confused or that there was an employee who did not listen or understand the challenge process does not mean that there was objectionable conduct by the Board agents.

There is no reasonable doubt presented by the record here that the integrity of the vote was not maintained. The Board should adopt the findings of the HOR.

3. The Board Agent at Niles did not engage in Objectionable Conduct

The Employer also excepts to the finding of the HOR that there was no competent evidence to establish that the Board agent at Niles assisted Petitioner with challenges or, if so, said conduct would have been objectionable. As noted by the HOR the only evidence of this allegation is hearsay evidence contained in a conversation with the Board agent and counsel for the Employer. The observer for the Employer testified and provided no testimony on the issue of the Board agent assisting with challenges. The Employer suggest that the Petitioner in some way should have rebutted the non-evidence presented, however that is not the burden of Petitioner in this case. Board procedures contemplate that the Board agent repeat and investigate a challenge. Section 11338.2. The Board agent keeping a record of challenges is in accordance with procedure and is not objectionable conduct. There is no evidence that the Board agent acted in a manner inconsistent with Board policy and procedure. The Employer exceptions should be rejected and the HOR adopted by the Board.

4. There is Insufficient Evidence to Conclude a Ballot was Lost

Not every conceivable possibility of irregularity requires setting aside an election, but only reasonable possibilities. *Trico Prods. Corp.*, 238 NLRB 380, 381 (1978). With the exception of one challenged ballot which may or may not be lost; there are no facts which actually support such a claim, there is no other indication that any other ballots were misplaced or lost. See also *Keystone Products*, 236 NLRB 697 (1978). As discussed in the HOR the

evidence adduced via stipulation and testimony was that an employee, Brianne Sadowski, appeared to vote and was challenged. There is no evidence that she actually cast a ballot or, if she did, that the ballot is actually lost. The Employer could have had the employee testify but it did not choose to do so. As noted by the HOR the Board agent could only say that the ballot was most likely in a sealed challenge envelope, assuming it was cast, which could not be opened.

Although not mentioned in the HOR it should be noted that even if the one ballot could not be counted the outcome of the election would not be effected. Based on the tally regardless of the vote the Union would still have a majority of the ballots cast and therefore it cannot be said that if the ballot is lost, which is pure speculation, it effected the outcome of the election.

The exceptions of the Employer as to the substance of the HOR on its objections should be rejected by the Board and the HOR adopted.

As noted above, the Employer spends about half of its Argument in its brief as well as takes several Exceptions to the HOR based on the conduct of the hearing itself as well as what the Employer characterizes as the violation of its due process rights through the hearing process as well as in the manner the HO interpreted evidence, law, and wrote his report. These Exceptions have no basis in law, Board procedure, or fact and should be summarily rejected.

Initially, the Employer characterizes the conduct of the hearing and the HO as providing it with a lack of due process. The Employer does not really explain how it was deprived of due process; the hearing was on its complaint, it presented evidence for three days using three different attorneys, and clearly had the right to present its witnesses and cross examine the witnesses of the Petitioner. The Employer claims however that the Spanish language interpreter was not competent and the HO did not allow the Employer to challenge the interpretation; that

the HO conducted significant proceedings off the record and refused to put them on the record; that the HO allowed the Petitioner's witness to testify over its objection and that the HO coached Petitioner on evidence; and that the HO made mistakes, misinterpreted evidence, did not allow the parties extra time to file a brief or extra pages, and essentially made the wrong decision. Although there is no law cited as to why any of these supposed irregularities are a lack of due process there is also no support in the record that any of these allegations are the basis for an exception.

First, the issue of the interpreter. The Operational Memo cited by the Employer, OM 06-75, clearly expects that there may be some question when using an interpreter. The guidelines state that the interpreter may correct his translation after hearing an objection and that there should be care taken in the questions given the complex nature of taking testimony through an interpreter. The cases as cited by the Employer support the intent of the memo as did the actions of the HO in this case. Thus, for example, the Employer complains about the interpretation contained in transcript pages 733-737. A review of those pages shows that one counsel for the Employer objected to the interpretation, that the HO asked the translator if he wanted to correct which he did, then the another counsel for the Employer also made a correction but not on the same basis and not on a "material" difference at which point the HO pointed out that there may be differences in how one would translate and objections should be made if there is a material difference. A similar exchange occurred at transcript 749=750. This is consistent with procedure and case law. The Employer never moved to disqualify the translator during the hearing nor does the Employer argue that any of the alleged errors materially effected its case or the ability of the HO to make a decision on any material issue.

The Employer also alleges that the HO engaged in inappropriate off the record discussions and then refused to put the same on the record. This is pure fantasy. First, to the extent the Employer was of the opinion that there was any inappropriate off the record discussion they had every opportunity to place their objections on the record or make an offer of proof. They did not do so. Again, their citations to the record bear little resemblance to what is actually in the record. Thus, the Employer states in its Exception 6 that at page 813 the Employer made a request not to have further off the record discussion. A reading of that passage shows that the parties were attempting to enter into a stipulation, that the HO asked if the parties wished to go off the record while a date was being looked for, that counsel for the Employer said that he would like to stay on the record while the search was being done, and the HO complied. This was not a request never to go off the record. Transcript cite to pages 694-695 is a confirmation of an off the record discussion which the Employer agrees to and does not object to any inaccuracy. Transcript cite to page 80 was an evidentiary issue raised by Petitioner where evidence had already been submitted as well as stipulated and the HO asked for a break to consider his ruling. He thereafter allowed the evidence and testimony. The cite to page 771 shows that counsel for the Employer asks to go off the record and upon return the HO says nothing came of the discussion and he will admit a document to which there was no objection. At no point does counsel for the Employer disagree or put what they want to put on the record. There is no basis for this Exception.

The Employer also excepts to the HO providing assistance, coaching, and warning Petitioner's counsel about documents. Again, the record does not support these Exceptions. Initially in Exception 3 there is a cite to Transcript 601 which does not support in any way the

statements in the Exception, the questions there are by the HO of an Employer witness, not Petitioner. The other cites contained in Exception 8 are to Transcript 736, a witness testifying through an interpreter, where the HO advises that the witness is pointing to a document and the question is being answered in the plural; Transcript 769 where the HO asks about the relevancy of an exhibit; Transcript 772-773 the HO is again questioning the relevancy of an exhibit and denies its admission; and at Transcript 809 the HO is ruling on an objection by the Employer which had been repeated several times regarding the hearsay nature of the testimony. None of these cites indicate any assistance or coaching. It is the normal procedure for a hearing and could probably be found throughout the transcript for the HO to insure a record that will address the issues raised. There was no off the record coaching on badges but even if there was it is not inappropriate. Representation hearings are fact gathering proceedings which, although adversarial in many respects, is intended not to be. Finally, the Board procedure has always left discretion as to accepting briefs to the HO and, if so, the length and type of brief. There is no due process right to file a brief. The Employer either does not understand the investigatory nature of these proceedings or chooses to ignore it but in any event it does not support a finding that the HOR should not be adopted.

The issues raised as to the rulings and factual findings of the HO are generally addressed above. Again, the Board defers to the factual finding of the HO and there is no reason not to do so here. Finally, the HO did not err in permitting the further testimony of Ms. Zavala. As noted the Employer's objection is clearly on the record and it was the role of the HO to consider the testimony - he did not need to accept it and ultimately it was not dispositive of any objection in any event. In addition, the Employer could have requested to bring any of these issues to the

Board. It chose not to do so.

Based on the foregoing as well as the complete record the HOR should be adopted by the Board and a certification of representative should issue.

Respectfully submitted,
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CERTIFICATE OF SERVICE

GAIL E. MROZOWSKI, an attorney, certifies that she served the foregoing **Answer to Exceptions** by electronic mail to the following on the 19th day of December, 2014 to:

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